Filed 12/23/08 Selleck v. Markell CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOM SELLECK et al., Plaintiffs and Respondents, v. RICHARD BRIAN MARKELL et al., Defendants and Appellants.	D052361 (Super. Ct. No. GIN056909)

APPEAL from an order of the Superior Court of San Diego County, Robert P. Dahlquist, Judge. Affirmed.

Defendants and appellants Richard Brian Markell, D.V.M, and Ranch & Coast Equine Practice, Inc. (together, Defendants), appeal the trial court's order disqualifying their attorneys of record, Stephen Robert Schwartz, Jr., and his law firm (together, Attorney Schwartz) from representing them in the underlying litigation. Attorney Schwartz previously had represented Paul McClellan, D.V.M., in the same litigation.

Dr. McClellan and Dr. Markell are both doctors of veterinary medicine, and both of them examined the horse "Zorro," the subject of the underlying litigation.

Plaintiffs and respondents Tom Selleck and Jillie Mack-Selleck, dba Descanso Farm (together, Plaintiffs), hired Dr. McClellan to conduct a pre-purchase examination of Zorro. Plaintiffs alleged Dr. McClellan was negligent in conducting the examination when he failed to discover Zorro was lame and thus unsuitable for the use intended by Plaintiffs.

After discovery, Plaintiffs dismissed Dr. McClellan without prejudice from the lawsuit, leaving open the possibility that Plaintiffs could later bring him back into the case. Without seeking the consent of Dr. McClellan (or, it would appear, Defendants), Attorney Schwartz agreed to represent Defendants after Plaintiffs amended their complaint and sued them for fraud and negligent representation, among other claims.

Dr. McClellan testified under penalty of perjury that during the course of his attorney-client relationship with Attorney Schwartz, he shared confidential information with him and that Attorney Schwartz agreed to represent him at trial after Dr. McClellan agreed to testify in support of Plaintiffs' claims against the remaining defendants. Dr. McClellan further claims that it is a conflict for Attorney Schwartz to now represent Defendants and that it would be unfair and improper for Attorney Schwartz, as counsel of Defendants, to cross-examine him at trial when Attorney Schwartz agreed to represent him during the trial.

Finally, Dr. McClellan argues his interests in the litigation are divergent from those of Dr. Markell, inasmuch as Defendants have been sued for fraud and negligent

misrepresentation, which if proved will exonerate Dr. McClellan from any wrongdoing. Dr. McClellan thus requested (in a motion brought by Plaintiffs) that Attorney Schwartz be disqualified from representing Defendants in the underlying action.

For reasons we shall explain, we conclude the trial court did not abuse its discretion when it disqualified Attorney Schwartz from representing Defendants in the underlying litigation. We thus affirm the order of disqualification.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant Delores Cuenca owned defendant Maxine, Inc. (Maxine), which in turn owned a horse named "Zorro." Plaintiffs in 2006 purchased Zorro for $120,000 from Maxine. Plaintiffs allege defendants Guillermo and Lynn Obligado, husband and wife, acted as Maxine's agent in bringing about the sale of Zorro to Plaintiffs.

Plaintiffs in their complaint alleged that the above defendants represented and warranted that Zorro was sound and suitable for use by Plaintiffs' daughter in competition, when in fact they knew the horse suffered from chronic and recurrent lameness. Plaintiffs sued these defendants for fraud and negligent misrepresentation, among other causes of action.

Plaintiffs also sued Dr. McClellan for negligence. Plaintiffs alleged they hired Dr. McClellan in May 2006 to conduct a pre-purchase examination of Zorro. Plaintiffs further alleged Dr. McClellan was asked to perform a thorough examination of Zorro to ensure Plaintiffs did not buy a horse unsuitable for competition.

Plaintiffs alleged Dr. McClellan's examination revealed that Zorro was lame in his right front leg, among other conditions. Despite receiving a disclosure form filled out by

defendant Lynn Obligado, who was present during the examination, Plaintiffs alleged Dr. McClellan failed to follow up on much of the information she provided about Zorro, including whether the horse had received veterinary treatment within the past 30 days.

Plaintiffs contended that if Dr. McClellan had required full and complete answers to the questions in the disclosure form, he would have learned that within the three days prior to his pre-purchase examination, Dr. Markell, the veterinarian for the remaining defendants, had administered five injections of hyalurionic acid and Vetalog to Zorro.[1] Plaintiffs further contended that if Dr. McClellan had known about these injections, he would not have certified Zorro as suitable for Plaintiffs' intended use.

Dr. McClellan tendered his defense to his professional liability carrier, who in turn retained Attorney Schwartz to represent Dr. McClellan in the underlying litigation. Attorney Schwartz and his firm have over 25 years of experience in defending veterinary liability cases.

The parties commenced discovery, including taking the deposition of Dr. McClellan and Dr. Markell. Attorney Schwartz subsequently persuaded Plaintiffs to dismiss Dr. McClellan without prejudice from the litigation, and Dr. McClellan agreed to testify in support of Plaintiffs' claims against the remaining defendants.[2]

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1 Hyalurionic acid is a joint lubricant. Vetalog is a tradename for triamcinolone acetonide, a potent steroid used in the aggressive treatment of a lame horse.

2 The settlement agreement between Plaintiffs and Dr. McClellan is not a part of the record on appeal.

After dismissing their negligence claim against Dr. McClellan, Plaintiffs amended their complaint and added Defendants to their causes of action for fraud, conspiracy to defraud, aiding and abetting fraud, negligent misrepresentation and aiding negligent misrepresentation. Plaintiffs alleged Defendants knowingly and actively participated with the remaining defendants in deceiving Plaintiffs regarding the progressive nature of Zorro's lameness.

Defendants tendered their defense to their professional liability insurer, who was also Dr. McClellan's carrier. The insurer (again) retained Attorney Schwartz, this time to defend Defendants in the underlying litigation. Attorney Schwartz had defended Dr. Markell in another case approximately 10 years earlier and had helped Dr. Markell with contract drafting over the years.

Shortly after being retained, Plaintiffs moved to disqualify Attorney Schwartz as counsel for Defendants. Plaintiffs filed the declaration of Dr. McClellan in support of their motion. Dr. McClellan testified under penalty of perjury that he shared with Attorney Schwartz "all of [his] confidential information concerning this case" in various meetings and conversations with Attorney Schwartz; that he relied upon Attorney Schwartz's counsel and advice in agreeing to a settlement with Plaintiffs, where he was dismissed without prejudice subject to being renamed as a defendant if new evidence surfaced; and that Attorney Schwartz helped him prepare for, and represented him at, his deposition.

In addition, Dr. McClellan testified that when he learned Attorney Schwartz had been retained to represent Defendants, who were the veterinarians for the remaining

defendants, he was "shocked and considered it a conflict of interest." Dr. McClellan further testified that he will be called as a witness in the underlying case; that he believes he was "intentionally misled by the defendants concerning the drugs given to the horse Zorro before the pre-purchase exam" he performed; that Dr. Markell "administered to Zorro injections of steroids into Zorro's joints a few days before the examination" conducted by Dr. McClellan; and that such injections would mask symptoms of lameness, rendering Dr. McClellan's examination meaningless. Dr. McClellan stated the fraud alleged by Plaintiffs "involves those steroid injections, who knew about them, and the failure to disclose them to [Plaintiffs] and/or to [him] as the veterinarian who performed the pre-purchase veterinary examination on [Plaintiffs'] behalf."

Dr. McClellan also testified that Attorney Schwartz had agreed to represent him at trial when Plaintiffs called him as a witness and that it seemed "unfair" and "improper" for Attorney Schwartz to cross-examine him as counsel for Defendants, particularly after Dr. McClellan had disclosed all of his confidential information to Attorney Schwartz.

Finally, Dr. McClellan testified that his and Dr. Markell's interests were "completely different" in the litigation and that a finding of fraud against one or more of the defendants would exonerate Dr. McClellan, inasmuch as if he had known of the steroid injections given Zorro three days before he examined the horse, he would not have performed the examination. Conversely, Dr. McClellan noted that Dr. Markell's interests would best be served by disproving that there was any fraud involved in connection with the steroid injections given Zorro. In light of this conflict,

Dr. McClellan asked that Attorney Schwartz be disqualified from representing Defendants in the underlying case.

Defendants opposed Plaintiffs' motion to disqualify Attorney Schwartz on two grounds. First, they argued Plaintiffs lacked standing to assert the existence of a conflict of interest between Dr. McClellan and Dr. Markell, inasmuch as Plaintiffs had no prior relationship with Dr. Schwartz. Second, Defendants argued their interests were not adverse to those of Dr. McClellan.

As to the second ground, Defendants argued there was "no possibility" that any confidential information acquired from Dr. McClellan could give rise to any unfair advantage against him if Attorney Schwartz represented Defendants in the same action because Dr. McClellan is no longer a party in the case and because the interests of Dr. McClellan and Defendants are not in conflict, as they both "conducted themselves lawfully and appropriately insofar as they had anything to do with the horse 'Zorro.' "

The trial court granted Plaintiffs' disqualification motion. The court recognized that motions to disqualify opposing counsel "are prone to abuse," and thus noted that it had "carefully" examined the request for disqualification and balanced the competing policy interests that are inherent in such requests. The trial court ruled Attorney Schwartz would violate his duty of loyalty and his duty to maintain the confidences of Dr. McClellan if Attorney Schwartz was permitted to cross-examine Dr. McClellan at trial. It further ruled Dr. McClellan's interests were sufficiently adverse to Defendants' interests such that Attorney Schwartz could not properly represent Defendants without Dr. McClellan's consent. Defendants appeal.

DISCUSSION

A. *Standard of Review*

Our Supreme Court in *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143-1144, summarized the standards to be applied in reviewing a trial court's decision to disqualify counsel as follows: "Generally a trial court's decision on a disqualification motion is reviewed for abuse of discretion. [Citations.] If the trial court resolved disputed factual issues, the reviewing court should not substitute its judgment for the trial court's express or implied findings supported by substantial evidence. [Citations.] When substantial evidence supports the trial court's factual findings, the appellate court reviews the conclusions based on those findings for abuse of discretion. [Citation.] However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]"

B. *Standing*

Defendants first argue the trial court erred in ruling Plaintiffs had standing to object to Attorney Schwartz's representation of Defendants. Plaintiffs contend the motion to disqualify brought by Plaintiffs "was improper on its face, precisely because it was filed *by* the plaintiffs, with whom [A]ttorney Schwartz had never had any relationship other than as an adversary. The motion was filed not for the proper purpose of vindicating and enforcing the obligations inherent in the attorney-client relationship,

but for the manifestly improper purpose of interfering with an opponent's (Dr. Markell's) choice of counsel." We disagree.

Generally, a motion to disqualify an attorney based on a conflict of interest is brought by one of the affected clients of the attorney. (See *DCH Health Services Corp. v. Waite* (2002) 95 Cal.App.4th 829, 832, citing *Colyer v. Smith* (C.D. Cal. 1999) 50 F.Supp.2d 966, 971.) However, a nonclient may have standing to bring a disqualification motion arising from a third-party conflict of interest if the nonclient can establish that the ethical breach is so "manifest and glaring" that it triggers the court's inherent obligation to manage the conduct of attorneys appearing before it and to ensure the fair administration of justice. (Vapnek, et al., Cal. Practice Guide: Professional Responsibility (The Rutter Group 2007) ¶ 4:322.11, p. 4-106.7, citing *Colyer v. Smith*, *supra*, 50 F.Supp.2d at pp. 971-972, and citing *DCH Health Services Corp. v. Waite*, *supra*, 95 Cal.App.4th at p. 832.)

The trial court in its order of disqualification recognized the instant case presented a "unique set of circumstances" inasmuch as the motion to disqualify was *not* brought by a client affected by the potential conflict of interest, but instead by Plaintiffs. In their motion, Plaintiffs attached the declaration of Dr. McClellan, who requested that Attorney Schwartz be disqualified from representing Defendants in the underlying litigation. The trial court noted it considered denying the motion to disqualify without prejudice, in order to allow Dr. McClellan to file the motion on his own behalf. However, citing to Civil

Code section 3532, the trial court found it would be an "idle act" to require Dr. McClellan to file his own motion.[3]

In addition, the trial court recognized its inherent power to control judicial proceedings before it. (See *Neary v. Regents of the University of California* (1992) 3 Cal.4th 273, 276-277; see also Code Civ. Proc., § 128, subd. (a)(8) [every court has the power to "amend and control its process and orders so as to make them conform to law and justice"].) The trial court noted that it was concerned that the issues involving Attorney Schwartz, if left unresolved, would resurface at trial and that requiring Dr. McClellan to file his own motion would require him to obtain *new* counsel because Dr. McClellan could not expect Attorney Schwartz to file a motion to disqualify himself. Exercising its inherent power to control the proceedings before it, the trial court thus treated Dr. McClellan's declaration as a joinder by Dr. McClellan in the pending motion to disqualify.

We conclude from the facts of this case that the trial court did not abuse its discretion in treating Dr. McClellan's request to disqualify Attorney Schwartz as a joinder in Plaintiffs' motion. Trial courts possess the "inherent judicial power to do whatever is necessary and appropriate, in the absence of controlling legislation, to ensure the prompt, fair, and orderly administration of justice." (*Neary v. Regents of the University of California*, *supra*, 3 Cal.4th at p. 276.)

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3 Civil Code section 3532 provides: "The law neither does nor requires idle acts."

Here, the trial court properly recognized that the issue involving Attorney Schwartz and his representation of both Drs. McClellan and Markell was not going to go away and in fact would likely resurface at trial (if not sooner); that the relief sought by Dr. McClellan in his declaration was to disqualify Attorney Schwartz from representing Defendants in the underlying litigation; that to force Dr. McClellan to file his own disqualification motion would amount to an "idle act"; and perhaps the most compelling reason, that Dr. McClellan would have to obtain new counsel to file such a motion because Attorney Schwartz cannot file a motion to disqualify himself. Taken together, these reasons strongly support the conclusion the trial court properly exercised its inherent power to control judicial proceedings. We thus turn to the merits of the motion to disqualify.

C. *Disqualification*

A trial court's authority to disqualify an attorney derives from its inherent power to "control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." (Code Civ. Proc., § 128, subd. (a)(5); see also *Oaks Management Corp. v. Superior Court* (2006) 145 Cal.App.4th 453, 462.) A disqualification motion involves a conflict between a client's right to counsel of his or her choice, on the one hand, and the need to maintain ethical standards of professional responsibility, on the other hand. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at pp. 1145-1146.) These ethical duties are mandated by the

California Rules of Professional Conduct, rule 3-310, subdivisions (C) and (E).[4] (*City and County of San Francisco v. Cobra Solutions, Inc., supra,* 38 Cal.4th at p. 846.)

"The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations that affect the fundamental principles of our judicial process. [Citations.]" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at pp. 1145-1146; see also *Jessen v. Hartford Casualty Ins. Co.* (2003) 111 Cal.App.4th 698, 705-706.)

The legal standards for determining whether attorney disqualification is warranted turns on whether the challenged representation is successive or concurrent, and the policies implicated in each. (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284 (*Flatt*).) In cases when an attorney represents two or more clients with conflicting interests in successive representations, courts apply a so-called "substantial relationship" rule. (*Ibid*.) Under that rule, an attorney who has previously represented one client may be

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4 All further references to rules are to the Rules of Professional Conduct. Rule 3-310, subdivision (C), provides: "A member shall not, without the informed written consent of each client: [¶] (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or [¶] (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or [¶] (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." Rule 3-310, subdivision (E), provides: "A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment."

disqualified from representing a successive client in litigation adverse to the interests of the former client where a "substantial relationship" exists between the subjects of the previous and current representations. (*Id.* at p. 283.)

"The 'substantial relationship' test mediates between two interests that are in tension in such a context−the freedom of the subsequent client to counsel of choice, on the one hand, and the interest of the former client in ensuring the permanent confidentiality of matters disclosed to the attorney in the course of the prior representation, on the other [hand]." (*Flatt v. Superior Court, supra,* 9 Cal.4th at p. 283.) "Where the requisite substantial relationship between the subjects of the prior and current representations can be demonstrated, access to confidential information by the attorney in the course of the first representation (relevant, by definition, to the second representation) is *presumed* and disqualification of the attorney's representation of the second client is mandatory; indeed, the disqualification extends vicariously to the entire firm. [Citations.]" (*Id.* at pp. 283-284.)

In concurrent representations, an automatic disqualification rule applies. (*Flatt*, *supra*, 9 Cal.4th at p. 284.) This rule prohibits concurrent representation of adverse interests and, with certain limited exceptions, is "a *per se* or 'automatic' one." (*Ibid.*) Unlike a successive representation case where the "substantial relationship" is based on the duty of confidentiality, the automatic disqualification rule for concurrent representation is grounded in the duty of loyalty. (*Id.* at pp. 284-285 ["The primary value at stake in cases of simultaneous or dual representation is the attorney's duty−and the client's legitimate expectation−of *loyalty*, rather than confidentiality"].) Thus, whether an

attorney actually possesses confidential information from the client that could be used against that client is immaterial in concurrent representation cases. (See *Truck Ins. Exchange v. Fireman's Fund Ins. Co.* (1992) 6 Cal.App.4th 1050, 1056-1057.)

Here, the trial court found a "genuine conflict" existed between the interests of Dr. McClellan, on the one hand, and Dr. Markell, on the other hand, because the "fraud alleged against [Dr. Markell] will most likely exonerate Dr. McClellan," who was sued only for negligence in connection with his pre-purchase exam of Zorro. The trial court relied on the testimony of Dr. McClellan that he was "misled by fraud by one or more of the other defendants by administering steroids to ZORRO a few days before [he] performed a pre-purchase exam, and not advising [him] or the [Plaintiffs] of the steroid injections."

The trial court further noted that Dr. McClellan testified he had "meetings and conversations" with Attorney Schwartz where Dr. McClellan "shared with him all of [Dr. McClellan's] confidential information concerning this case." Dr. McClellan also testified that he relied on the counsel and advice of Attorney Schwartz in entering "into a settlement with the [Plaintiffs] . . . which left open the possibility of later being sued" by Plaintiffs. Dr. McClellan also agreed to testify in support of Plaintiffs' claims against the remaining defendants, including Defendants, and Attorney Schwartz agreed to represent Dr. McClellan when Plaintiffs call him as a witness at trial.

We conclude the trial court did not abuse its discretion in ordering Attorney Schwartz disqualified from representing Defendants in the underlying litigation. Under Rule 3-310, subdivision (E), Attorney Schwartz could not undertake the representation of

Defendants without first obtaining the informed written consent of Dr. McClellan, inasmuch as the interests of the two clients are in fact adverse, as so found by the trial court, which findings we conclude are supported by the testimony of Dr. McClellan.

Indeed, there is no dispute that Attorney Schwartz did not obtain consent from Dr. McClellan *before* agreeing to represent Defendants in the *same* litigation; that Dr. McClellan provided Attorney Schwartz with all of his confidential information during the course of that representation; that Attorney Schwartz agreed−before Attorney Schwartz undertook the representation of Defendants−to represent Dr. McClellan at trial when he is called as a witness by Plaintiffs to testify in support of their case; that a finding of fraud (or negligent misrepresentation) by one or more of the defendants (including Dr. Markell) in not disclosing the prior treatment of Zorro would exonerate Dr. McClellan from any wrongdoing; that Dr. McClellan could still be brought back into the case (by Plaintiffs, or as a cross-defendant) if further discovery suggests he may be liable; that if the underlying case goes to trial and Attorney Schwartz is allowed to continue representing Defendants, Attorney Schwartz will end up having to cross-examine his own former *and then-current client*, Dr. McClellan, on behalf of Defendants; and that information used by Attorney Schwartz in that cross-examination could involve confidential information he learned while representing Dr. McClellan. In light of such facts, we conclude the trial court did not abuse its discretion when it disqualified Attorney Schwartz from representing Defendants in the underlying litigation.

Defendants argue they were not required to obtain the informed written consent of Dr. McClellan because his interests are not adverse to Defendants, as required by Rule 3-

310, subdivision (E). They argue the two veterinarians' interests are not adverse because discovery conducted in the underlying case shows both Dr. McClellan and Dr. Markell "conducted themselves lawfully and appropriately insofar as they had anything to do with the horse 'Zorro.' "[5]

However, when findings of fact are challenged on appeal, we are bound by the substantial evidence rule, which requires us to review the entire record to determine whether substantial evidence supports the appealed judgment. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) In so doing, we "view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660.) If the record demonstrates substantial evidence in support of the judgment, we must affirm even if there is substantial contrary evidence. (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 874.)

Because the trial court's finding the interests of the two veterinarians are adverse is supported by substantial evidence in the record, we must affirm even if there is contrary

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5 In their opposition to the motion to disqualify, Defendants argued to the trial court that "if Plaintiffs had sued *both* Dr. McClellan and Dr. Markell from the outset, there would be no actual conflict of interest that would have prevented Attorney Schwartz from representing both of those doctors." Not surprisingly, Defendants have abandoned this argument on appeal, inasmuch as Dr. McClellan (Plaintiffs' veterinarian) was sued for negligence in connection with his pre-purchase exam of Zorro, whereas Defendants (the veterinarian for the remaining defendants) were sued for fraud and misrepresentation in connection with their treatment of Zorro that would mask the symptoms of lameness, a condition Dr. McClellan was hired to detect.

evidence in the record suggesting, as Defendants contend, that neither doctor (allegedly) did anything wrong, or that Attorney Schwartz (allegedly) did not receive any confidential information in the attorney-client relationship with Dr. McClellan that varies from the information derived from the parties' discovery, which is ongoing.

We also reject Defendants' argument that the instant case presents a situation similar to that in *Elliott v. McFarland Unified School Dist.* (1985) 165 Cal.App.3d 562 (*Elliott*), where a client sought to disqualify its former attorney by relying solely on conclusory statements. However, *Elliott* is distinguishable from the instant case on many levels.

Unlike the situation at hand, in *Elliott* the two defendants had entered into a "joint powers agreement" the court interpreted as providing written consent to their joint representation (*Elliott v. McFarland Unified School Dist., supra,* 165 Cal.App.3d at p. 568); the relief sought against the two defendants by plaintiff was the same−to pay plaintiff for uncompensated vacation days (*id.* at p. 566); the joint representation of defendants merely "consisted of filing points and authorities and arranging an extension for these parties to answer" plaintiff's complaint (*id.* at p. 567); and one of the defendants waited until four days before trial to object to the joint representation (*id.* at p. 566), thus implicating the policy of preventing tactical abuse by seeking disqualification of opposing counsel.

We instead conclude cases such as *Dill v. Superior Court* (1984) 158 Cal.App.3d 301, distinguished by the court in *Elliott*, are more factually on point here. In *Dill*, for example, the plaintiff moved to disqualify an attorney and his law firm on the ground the

attorney formerly represented plaintiff in the same action. In opposition to disqualification, the attorney declared he did not obtain any confidential information regarding plaintiff, did not learn about plaintiff's litigation strategy while representing plaintiff and had not discussed the case with anyone in his new law firm. (*Id*. at p. 303.)

The court in *Dill* noted the attorney had appeared in court on behalf of plaintiff and had taken two depositions while representing plaintiff. Based on this uncontroverted evidence, the court concluded the "substantial relationship" test was easily satisfied. In rejecting the attorney's argument he obtained no confidential information about the case while representing plaintiff, the court noted: "However, actual possession of confidential information is not required for an order of disqualification. '[¶] When a substantial relationship has been shown to exist between the former representation and current representation, and when it appears by virtue of the nature of the former relationship or the relationship of the attorney to his former client confidential information material to the current dispute would normally have been imparted to the attorney . . . the attorney's knowledge of confidential information is presumed. [Citations.]' " (*Id.* at pp. 304-305; see also *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 483, 489.)

We are not unmindful of the rights of a party to counsel of his or her choice, and of the potential financial burden imposed on a party when his or her counsel is disqualified. (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th at pp. 1145-1146.) However, as we have noted the "paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar. The important right to counsel of one's choice must yield to ethical considerations

that affect the fundamental principles of our judicial process. [Citations.]" (*Ibid.*) We thus conclude the trial court did not abuse its discretion when it disqualified Attorney Schwartz from representing Defendants in the underlying litigation.

Separate and apart from the continuing duty of confidentiality (rule 3-310, subd. (E)), we also conclude, as did the trial court, that Attorney Schwartz is subject to disqualification based on the duty of loyalty. This duty prohibits an attorney's concurrent representation of clients with adverse interests and, with certain limited exceptions, is "a *per se* or 'automatic' one." (*Flatt*, *supra*, 9 Cal.4th at p. 284; see also rule 3-310, subd. (C)(3).) The trial court found Attorney Schwartz would violate the duty of loyalty if he or a member of his law firm were permitted to cross-examine Dr. McClellan at trial. We agree.

Moreover, once Dr. McClellan learned that Attorney Schwartz had undertaken the defense of Defendants, Dr. McClellan testified he was shocked, considered it unfair and a conflict of interest. Yet if, as the trial court noted, Dr. McClellan had wanted to move to disqualify Attorney Schwartz from representing Defendants in the underlying litigation, or if Dr. McClellan had merely wanted to know his rights in that (unique) situation (including his right to disqualify Attorney Schwartz), Dr. McClellan would have had to hire separate legal counsel, as Attorney Schwartz clearly could not be expected to counsel Dr. McClellan on such issues or move to disqualify himself.

We thus conclude the trial court's finding of an adverse interest for purposes of the duty of loyalty (rule 3-310, subd. (C)(3)) is amply supported by this record. (*Bowers v. Bernards*, *supra*, 150 Cal.App.3d at p. 874.) We further conclude the trial court did not

abuse its discretion in disqualifying Attorney Schwartz based on his potential violation of this loyalty, which he owed to Dr. McClellan.

DISPOSITION

The order disqualifying Attorney Schwartz from representing Defendants in the underlying litigation is affirmed. Plaintiffs are entitled to their costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.